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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 315

J. S. ODLAND, AS RECEIVER OF THE NATIONAL BANK OF FAIRMONT, WEST VIRGINIA,

Petitioner,

vs.

FAIRMONT SUPPLY COMPANY, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA.

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No. 315

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vs.

FAIRMONT SUPPLY COMPANY, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, J. S. Odland, as Receiver of the National Bank of Fairmont, West Virginia, by direction of the Comptroller of the Currency, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Marion County, West Virginia, rendered in this case on February 13, 1942 (R. 186), an appeal from this judgment having been refused by the Supreme Court of Appeals of West Virginia on May 18, 1942 (R. 1).

I.

Opinions and Decrees of Courts Below.

The final judgment of the Circuit Court of Marion County, West Virginia (R. 186-191), entered on February 13, 1942, is not reported. The order of the Supreme Court of Appeals of West Virginia on May 18, 1942, refusing the appeal prayed for by petitioner appears in the record at page 1.

Earlier Proceedings.

The decree of the Circuit Court of Marion County, West Virginia, dated November 12, 1940, overruling respondent's demurrer, appears in the record at pages 148-152. The order of the Supreme Court of Appeals of West Virginia of March 15, 1941, reversing the decree of November 12, 1940, appears in the record at page 153, and the order of the Supreme Court of Appeals of West Virginia of May 19, 1941, denying rehearing, appears in the record at page 154. The opinion of the Supreme Court of Appeals of West Virginia of March 15, 1941, is reported in 14 S. E. (2d) 436 and appears in the record at page 194. The Supreme Court of the United States denied a petition for writ of certiorari, "for the want of a final judgment", on November 10, 1941, No. 669, October Term, 1941, 314 U. S. 679.

II.

Jurisdiction.

Jurisdiction to review the judgment of the Circuit Court of Marion County, West Virginia, is granted by Section 237(b) of the Judicial Code (U. S. C. title 28, sec. 344(b)) providing for the granting of a writ of certiorari by this Court to review a final judgment or decree of the highest

court of a state in which a decision could be had in which a right, title or privilege is claimed under a statute of the United States.

As will more fully hereinafter appear, petitioner, as receiver of said national bank, claims, under the national banking laws, the rights, titles and privileges by him asserted and relied upon in the aforesaid cause by him filed.

The record discloses that petitioner's appeal from the judgment of the Circuit Court of Marion County entered on February 13, 1942 (R. 186-191) was refused by the Supreme Court of Appeals of West Virginia on May 18, 1942 (R. 1) *as plainly right* and hence it follows that the decree of the Circuit Court of Marion County, West Virginia, constitutes the final decree of the highest court of the state in which a decision could be had. Sections 5795 and 5811 of the West Virginia Code; *Moore* v. *Johnson,* (1884) 24 W. Va. 549; *Blumberg* v. *Snyder,* (1922) 90 W. Va. 145, 148; *Virginian Railway Company* v. *Mullins,* (1926) 271 U. S. 220; *Wheeling Steel Corp.* v. *Fox,* (1936) 298 U. S. 193, 205; *Norfolk Turnpike Co.* v. *Virginia,* (1912) 225 U. S. 264.

III.

Summary Statement of the Matters Involved.

Petitioner's predecessor Howard Hardesty, as Receiver of the National Bank of Fairmont, West Virginia, filed suit (R. 11-24) in the Circuit Court of Marion County, West Virginia, against Respondent to compel it to perform its contract to purchase from said receiver certain real property constituting assets of the receivership. The bill of complaint alleged in substance:

That the predecessor receiver, one Robert C. Miller, had as receiver of said bank obtained judgment against a debtor of the bank, and thereafter said Miller, as such receiver,

filed proceedings to cause the sale of certain real estate belonging to said debtor and to have the proceeds thereof applied towards satisfaction of said judgment (R. 14-19). At the sale of said property by the Special Commissioner appointed by the court for that purpose, said Miller, as such receiver, in pursuance of instructions from the Comptroller of the Currency, and as permitted by the Act of Congress of March 29, 1886, (U. S. C. title 12, sec. 198-200; App. pg. 26-28, see discussion, *infra,* pg. 14, purchased said real estate (R. 18) and the proceeds of the purchase price were duly credited upon said judgment (R. 19). The Special Commissioner, by direction of the court, upon performance of said sale, executed deeds of said real estate to said Miller. (The bill of complaint, para. VI (R. 19) states that the property was conveyed by said deeds to "R. C. Miller, Receiver * * *", but Exhibits P. to S., referred to in said paragraph show (R. 80-91) that the full name, "Robert C. Miller", was used in said deeds, so that the Special Commissioner's deeds ran to "Robert C. Miller, Receiver of the National Bank of Fairmont, an insolvent national banking association".)

That the sale of said real estate to said Miller was: (R. 18) "In fact made to said R. C. Miller in his capacity as Receiver of said *The National Bank of Fairmont,* and which purchase money was in fact paid by said receiver as such from the funds of said The National Bank of Fairmont, * * *".

That thereafter said Robert C. Miller died, and Howard Hardesty was appointed successor to said Miller as receiver of the bank.

In due course, Howard Hardesty as receiver, by direction of the Comptroller (R. 20) sold said real estate to respondent,—Fairmont Supply Company, a corporation,—and a written contract covering said sale was executed by Howard Hardesty as receiver and by respondent, and a payment

on account was made, the balance to be paid in due course at the closing of the transaction (R. 20; R. 91). Said sale by Howard Hardesty as receiver was duly approved by the Circuit Court of Marion County, West Virginia, in accordance with the requirements of U. S. C. title 12, sec. 192 (R. 21).

Thereupon said receiver tendered respondent appropriate receiver's deeds purporting to convey said property to respondent. Respondent refused to complete the sale on the ground that receiver's title was defective for the reasons hereinafter indicated.

Howard Hardesty, as receiver of said bank, thereupon filed the bill of complaint in the instant case in the Circuit Court of Marion County, West Virginia, to compel specific performance, setting forth, in detail, the previous court proceedings covering the purchase and acquisition of title of said property by said Miller, as receiver, and the subsequent sale of the property by Howard Hardesty, as successor receiver, to the Fairmont Supply Company.

Respondent demurred to the bill of complaint (R. 144-148) and therein set up by way of defense that said bill of complaint did not show the receiver had such title to said real estate as would enable him to "institute, prosecute and maintain this chancery cause against said defendant" (R. 144), and hence that "defendant as such purchaser would acquire no title or interest in said real estate by acceptance of any deed from said plaintiff" (R. 145).

As grounds for the defense thus made by said demurrer, respondent therein contended:

(a) Said deeds of the Special Commissioner should have conveyed said property to "The National Bank of Fairmont" (R. 147) and that in the language of said deeds purporting to convey title to said property to "Robert C. Miller, Receiver of The National Bank of Fairmont, an

insolvent national banking association," the words "Receiver of The National Bank of Fairmont, an insolvent national banking association," were merely descriptive words of Robert C. Miller (R. 145), and "that by virtue of such conveyances the legal title and equitable title to said real estate vested in Robert C. Miller, individually, and that by reason thereof, neither the said Robert C. Miller in his capacity as Receiver of said The National Bank of Fairmont, nor the said bank itself, acquired any title to said real estate, either legal or equitable" (R. 144).

(b) That upon the death of said former Receiver, the title to said real estate passed and vested in the heirs at law of said Miller (R. 145).

(c) That even:

> "If it could be legally established that some title or interest in said real estate did pass to and vest in the said Robert C. Miller in his fiduciary capacity as Receiver of said The National Bank of Fairmont, the same has not been by any instrument or operation of law, or in any other way, transferred or vested in said plaintiff, as successor Receiver to the said Robert C. Miller, Receiver of said The National Bank of Fairmont" (R. 145).

The Circuit Court of Marion County, West Virginia, overruled respondent's demurrer to the receiver's bill of complaint and in effect held that said Robert C. Miller, as Receiver of said bank, had, by said deeds from said Special Commissioner, acquired good title to said real estate in his official capacity as receiver of said bank, and that Howard Hardesty, as successor receiver of said bank, obtained good title to said property and could convey good title thereof to the Fairmont Supply Company, as the purchaser thereof from petitioner at the aforesaid auction sale.

Decision of Supreme Court of Appeals of West Virginia on March 15, 1941.

Upon certification of points of law to the Supreme Court of Appeals of West Virginia (R. 149-153), the Supreme Court of Appeals reversed the Circuit Court and sustained the points raised in respondent's demurrer. The court held in effect, that the deeds from the Special Commissioner to Miller, the predecessor receiver, conveyed title to said property to Miller individually, and not to him in his representative capacity on behalf of the bank, and further, that even if it be assumed that title had passed to Miller in his representative capacity, as receiver, said title did not, after the death of Miller and upon the appointment of his successor Howard Hardesty, pass to the successor receiver inasmuch as there was no provision in the national banking laws for passage of title by operation of law, from a receiver of a national bank to a successor receiver. More specifically, the court held:

(1) In considering the questions presented, consideration must be given to the effect of appointment of a Receiver of a national bank and the authority and powers of the Receiver so appointed (R. 196).

(2) An insolvent national bank does not lose its corporate existence upon the appointment of a Receiver, and the bank may still enter into transactions not forbidden by law (R. 196).

(3) In the light of the West Virginia case of *Rhinehart, Receiver* v. *Ireland,* 120 W. Va. 599, 199 S. E. 871, a receiver of a state bank has authority to take title in his own name in his official capacity to property purchased by him on behalf of his receivership, but a state bank receiver has "wider powers than those given to the receiver of a

national bank. The receiver of a national bank is an agent whose authority is limited by law" (R. 198).

(4) Under the law of West Virginia,—"where a conveyance is made to a person whose name is followed by an official title or name of office, the title or office is merely *descriptio personae* of the grantee and title vests in the grantee individually" (R. 197).

Hence, notwithstanding Receiver Miller "was apparently acting in a fiduciary capacity as Receiver of the bank" and even "if he used the funds of his trust in purchasing said real estate" (R. 198), the deeds purporting to convey title to "Robert C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association" had the effect of conveying legal title to Robert C. Miller, individually.

(Point 3, as certified to the Supreme Court of Appeals, was to the effect (R. 150) that even if it were assumed that title did pass to said Robert C. Miller in his fiduciary capacity as receiver, "there is no statutory provision, *either Federal or State,* transferring legal or equitable title for real estate from a receiver of a Federal bank to a successor receiver of a Federal bank.")

The decision of the Supreme Court of Appeals upon the foregoing certified point was as follows:

(5) There is no "statute which authorizes the receiver of a national banking association to take title from his deceased predecessor by operation of law. There being no such statutory provision, the legal title, upon the death of Miller, passed to his heirs by the laws of descent prevailing in this jurisdiction" (R. 198).

A petition for writ of certiorari to review the decision of the Supreme Court of Appeals of West Virginia (No. 669,

October Term, 1941) was denied by this Court *for the want of a final judgment* on November 10, 1941.

Final Judgment in Circuit Court of Marion County.

After the case was remanded to the Circuit Court the plaintiff amended his bill, making the heirs of Robert C. Miller parties defendant, and averred that the said Robert C. Miller in his lifetime in his trust capacity as receiver of The National Bank of Fairmont, pursuant to authority from the Comptroller of the Currency, purchased the real estate in question for his trust, and paid therefor out of the trust funds in his hands, and that the title conveyed to him as such receiver was in fact intended to be solely for the benefit of his trust, and that Robert C. Miller did not, nor did his heirs, have any interest in said real estate individually (R. 155-173). All the adult heirs answered the amended bill admitting its allegations (R. 175). The Fairmont Supply Company answered the amended bill admitting its allegations (R. 177). The matter was continued for further hearing as to the infant defendant (R. 179). Later, plaintiff moved to dismiss his amended bill in order that there might be a final decree on the sufficiency of the original bill and that the questions arising on the demurrer to the original bill might be again reviewed (R. 180).

The respondent, Fairmont Supply Company, objected to the dismissal of plaintiff's amended bill, but its objection was overruled and plaintiff's amended bill was dismissed (R. 189). J. S. Odland, as Receiver of The National Bank of Fairmont, was substituted as party plaintiff in this cause in lieu and stead of said Howard Hardesty who resigned as receiver (R. 187). Plaintiff then declined to amend his original bill after the dismissal of the amended bill, and thereupon the court entered the order complained of here, wherein it sustained the demurrer of Fairmont Supply

Company to plaintiff's original bill, denied plaintiff the relief prayed for, and decreed "that the bill of complaint of the plaintiff filed herein and this cause be and the same are hereby dismissed" (R. 189).

Petitioner thereupon filed in the Supreme Court of Appeals of West Virginia a petition for an appeal from said final decree entered by the Circuit Court of Marion County under date of February 13, 1942, and assigned errors (R. 8) which are repeated here for convenience:

FIRST, in sustaining the demurrer of Fairmont Supply Company to plaintiff's original bill and in dismissing said cause.

SECOND, in holding that under the National Bank Act, and particularly under U. S. C., Title 12, Chapter 2, Sections 191, 192, 198, 199 and 200, Robert C. Miller as Receiver, did not have capacity and power to take title to said real estate in his name in his official capacity as receiver of said bank, but that the title, though paid for out of trust funds of the bank, should have been conveyed to the bank, and because it was conveyed to him as Receiver, upon his death the title passed to his heirs.

THIRD, in holding that under the National Bank Act, and particularly under U. S. C., Title 12, Chapter 2, Sections 191, 192, 198, 199 and 200, the title conveyed to Robert C. Miller in his official or fiduciary capacity did not, upon his death, pass to his successor Receiver by operation of law.

FOURTH, in holding that notwithstanding the provisions under the National Bank Act, and particularly under U. S. C., Title 12, Chapter 2, Sections 191, 192, 198, 199 and 200, that though the property was paid for by the Receiver out of funds of his trust for the benefit of his trust, where the Receiver took title to himself in his official capacity, the rule of law in West Virginia which makes the official title or

name in office merely *descriptio personae* of the grantee, applies to deeds purporting to convey title to real estate in that State to the receiver of a national bank in his official capacity, and therefore, the title in such a conveyance passed to the receiver individually.

FIFTH, in holding that notwithstanding the provisions under the National Bank Act, and particularly under U. S. C., Title 12, Chapter 2, Sections 191, 192, 198, 199 and 200, the foregoing matters in the instant case are questions controlled by the laws of the State of West Virginia and not by the national banking laws of the United States.

Petitioner's appeal to the Supreme Court of Appeals of West Virginia was refused by that court (R. 1).

IV.

Specification of Errors.

The Circuit Court of Marion County erred:

(1) In holding that under the national banking laws and particularly under U. S. C., Title 12, Secs. 191, 192, 198, 199 and 200, Robert C. Miller, as Receiver of an insolvent national bank, did not have capacity and power to take title to said real estate, in his name, in his official capacity as receiver, but that the title, though paid for out of trust funds of the bank, should have been conveyed to the bank, and because it was conveyed to him as receiver, upon his death the title passed to his heirs.

(2) In holding that under the national banking laws the title conveyed to Robert C. Miller in his official or fiduciary capacity, did not, upon his death, pass to his successor receiver by operation of law.

(3) In holding that notwithstanding the provisions of the national banking laws, though the property was paid for

by the receiver out of funds of his trust for the benefit of his trust, where the receiver took title in his name in his official capacity, the rule of law in West Virginia which makes the official title or name in office merely *descriptio personae* of the grantee, applies to deeds purporting to convey title to real estate in that State to the receiver of a national bank in his official capacity, and therefore, the title in such conveyance passed to the receiver individually.

(4) In holding that notwithstanding the provisions of the national banking laws, the foregoing matters in the instant case are questions controlled by the laws of West Virginia and not by the national banking laws of the United States.

V.

Questions Presented.

(1) Under the national banking laws, does the receiver of a national bank, when duly authorized to purchase real property on behalf of his receivership, have capacity and power to take title to said property in his name, in his fiduciary and representative capacity as receiver of said bank, or must said title in terms be conveyed to, and in the name of, the receivership bank as a corporation, in order to avoid the consequences of title passing to said receiver in his individual and personal capacity?

(2) Upon the death or resignation of a receiver of a national bank, do the receivership assets pass, by operation of the national banking laws, from the predecessor receiver to his successor in office?

(3) Does the law of West Virginia to the effect that:

> "Where a conveyance is made to a person whose name is followed by an official title or name of office, the title

> or office is merely *descriptio personae* of the grantee and title vests in the grantee individually.",

apply to deeds purporting to convey title of real property to a national bank receiver in his fiduciary or representative capacity as receiver?

VI.

Contentions of Petitioner.

(1) The National Bank Act (U. S. C., Title 12, Sec. 192) provides that upon appointment of a receiver for a national bank, said receiver, under the direction of the Comptroller of the Currency, shall take possession of the assets of said bank, collect and liquidate debts and obligations belonging to it, and, upon the order of a court of record of competent jurisdiction, said receiver may sell all of the real and personal property of the bank; and that all money received by him from such liquidation shall be paid to the Treasurer of the United States, subject to the order of the Comptroller of the Currency (Appendix, p. 26).

This statute does not, however, in terms specify whether title to receivership assets shall remain and continue in the national bank as owner or whether title shall pass to the receiver.

The decisions of this Court have held, however, in substance, that title to assets of a national bank pass by operation of law to the receiver as a statutory assignee. In *Kennedy* v. *Gibson* (1869), 8 Wall. 498, this Court held (at p. 506):

> "The receiver is the statutory assignee of the association, and is the proper party to institute all suits; they may be brought both at law and in equity, in his name, or in the name of the association for his use. He represents both the creditors and the association, and when

> he sues in his own name it is not necessary to make either a party to the suit."

Other cases are to the same effect. See *Scott* v. *Armstrong* (1892), 146 U. S. 499, 506; *Earle* v. *Pennsylvania* (1900), 178 U. S. 449, 455; *Fish* v. *Olin* (Vt.), 56 Atl. 533, 534, 76 Vt. 120; *Anderson* v. *Cronkleton* (C. C. A. 8th, 1929), 32 F. (2d) 170, 171.

The Act of March 29, 1886 (U. S. C., Title 12, Secs. 198-200; Appendix, p. 26-28, provides, in effect, that when properly authorized by the Comptroller of the Currency and by the Secretary of the Treasury, the receiver of a national bank may, for the protection of the receivership interests, purchase property at execution sale and expend funds of the receivership in payment for such property.

The foregoing statutory provisions do not indicate or specify whether title shall be taken in the name of the receiver in his fiduciary or representative capacity, or whether title shall be taken in the name of the national bank as a corporation.

Examination of the authorities seems to indicate that this question has not been passed upon by the courts. However, the cases above cited hold that title to assets of the receivership bank passes to the receiver as a statutory assignee and that suits on behalf of the bank may be brought in the name of the receiver and, consequently, it is believed the conclusion should also be reached that under said Act of March 29, 1886, *supra,* it was intended, or at least permitted, that title to the property thus purchased could be taken in the name of the receiver in his fiduciary or representative capacity as receiver. In *American Surety Co. of New York* v. *Bethlehem Nat'l Bank,* 314 U. S. 314, 316, this Court held in passing on a question arising in the liquidation of an insolvent national bank:

> "Congress has seen fit not to anticipate by specific rules solution of problems that inevitably arise in national bank liquidations."

It has long been the construction of said Act of March 29, 1886, by the Comptrollers of the Currency, and, in consequence thereof, it has long been the settled practice, that title to real property acquired under authority of said statute should be taken in the name of the receiver in his fiduciary or representative capacity, rather than in the name of the bank as a corporation.

This Court has uniformly held that great weight may properly be given to settled construction of a statute by the Executive Department charged with its administration, and that such construction should not be overturned unless clearly wrong or unless a different construction is plainly required. *United States* v. *Jackson,* (1929) 280 U. S. 183, 193; *Heath* v. *Wallace,* (1891) 138 U. S. 573, 582; *Brewster* v. *Gage,* (1929) 280 U. S. 327, 336; *Inland Waterways Corp.* v. *Young,* (1940) 309 U. S. 517, 524; *Rawlings* v. *Ray,* (1941) 312 U. S. 96, 99.

No question is raised concerning the fact that Receiver Miller had been duly authorized to purchase the real property in question and to pay for the same from the funds of the receivership (*supra,* p. 5, 6).

In view of the foregoing, it would seem clear that the general rule of property law of West Virginia to the effect that "Where a conveyance is made to a person whose name is followed by an official title or name of office, the title or office is merely *descriptio personae* of the grantee and title vests in the grantee individually", has no application to the deeds executed to "Robert C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association". The doctrine established by cases such as

Erie R. Co. v. *Tompkins,* 304 U. S. 64, does not require, nor permit, under the circumstances of the instant case, that the aforesaid rule of West Virginia property law apply to the aforesaid deeds.

(2) There is no provision in the national banking laws specifically indicating that upon the death or resignation of a receiver of a national bank, the title to the receivership assets shall pass to and vest in the successor receiver.

Examination of the reported cases seems to indicate that there are no decisions of this Court, or any other court, passing upon this question.

It has long been the position of the Comptrollers of the Currency, that upon the death or resignation of a receiver of a national bank, the title to the assets acquired by said receiver as statutory assignee, does pass, by operation of the national banking laws, to his successor receiver. Under the doctrines established in the cases previously cited, *supra,* (p. 15) it would seem that this interpretation and construction of the law by the Comptroller should not be disturbed. It is obvious that a contrary interpretation or construction to the effect that title does not pass from a receiver to his successor receiver, by operation of law, and that deeds of conveyance from the predecessor receiver, or his heirs, must be obtained, or that suits to establish title in the successor receiver must be filed, would seriously interfere with the liquidation of the receivership. A construction of the law having such consequences should not be adopted unless the previous position was clearly wrong, or unless a different construction is plainly required.

The sound construction of the law upon this point would seem to be that title to the receivership assets is, in legal effect, attached to, and vested in, the official office of receiver, and that changes from time to time in the incumbents of that office do not change or affect the situs of title

and consequently that each successor receiver in turn takes title as substituted statutory assignee.

Some help, in this connection, would seem to be derived, by analogy, from the provisions of section 11(a) of the Act of Congress of February 13, 1925 (U. S. C. title 28, c. 18, section 780, appendix, p. 28) wherein it is provided, in effect, that upon the death or resignation of an officer of the United States during the pendency of a suit relating to the discharge of the official duties of such officer, the court may permit the substitution of the successor in office of such officer. This statutory provision seems to recognize that the cause of action, and the rights incident thereto, are vested in the official office of said public officer, and not in said officer individually or personally. The following cases, construing said statute or similar statutes, seem to support this construction: *Allen* v. *Regents*, 304 U. S. 439, 444; *Thomas B. Bishop Co.* v. *Santa Barbara County, et al.*, (C. C. A. 9, 1938) 96 F. (2d) 198, 199-203, cert. den. 305 U. S. 623; *Brown-Crummer Inv. Co. of Wichita, Kan., et al.* v. *City of Florala, Ala., et al.*, 55 F. (2d) 238, 243; *Bowers, Collector of Internal Revenue* v. *American Surety Co.*, (C. C. A. 2, 1929) 30 F. (2d) 244, 246; *Sadler, Overseer of Poor* v. *Jeppson*, (1912) 82 N. J. L. 20, 82 Atl. 316-317; *Commonwealth* v. *Southern Pac. Co.*, (Ct. of Appls., Ky., 1907) 105 S. W. 466-468.

It is settled doctrine that the receiver of a national bank is an officer of the United States, and is the agent or representative of the Comptroller of the Currency, for the purpose of the administration of the receivership bank, and for the liquidation of its assets. See *U. S.* v. *Weitzel*, 246 U. S. 533, 541; *Kennedy* v. *Gibson, et al.*, and other cases, cited, p. 14 *supra*.

It is a general rule that the title, rights and powers of a trustee are annexed to the office, so as to pass to, and be capable of being dealt with and exercised by, a successor

of the original trustee, without any conveyance or assignment to the new trustee by the retiring trustee. *Lahey* v. *Kortright,* (Court of Appeals, N. Y., 1892) 132 N. Y. 450, 30 N. E. 989, 990; *Copple* v. *Morrison,* (Iowa, 1935) 264 N. W. 113, 115; *In re Doe's Will,* (Wisc., 1939) 285 N. W. 764, 767; *First Trust Co.* v. *Airedale Ranch & Cattle Co.,* (Nebr., 1939) 286 N. W. 766, 771; *Thomas* v. *Nat. Bank of Commerce,* (Wash., 1936) 60 Pac. (2d) 264, 269; *Gregory* v. *Merchants State Bank,* (Tenn., 1939) 135 S. W. (2d) 465, 474; *Stearns* v. *Fraleigh,* 39 Fla. 603, 23 So. 18, 21; *Coleman-Bush Inv. Co.* v. *Figg,* 95 Ky. 403, 25 S. W. 888; *Stokes* v. *Amerman,* (Sup. Ct. N. Y., 1889) 7 N. Y. S. 733, 734; *Fatjo* v. *Swasey,* 111 Calif. 628, 44 Pac. 225; *Bogert, Trusts & Trustees,* (1935) Vol. 3, sec. 532.

In the absence of a clear intention to the contrary, the power of sale conferred on a trustee is annexed to the office and passes to any person lawfully substituted in the place of the original trustee. *Lahey* v. *Kortright,* (Court of Appeals N. Y., 1892) 132 N. Y. 450, 30 N. E. 989, 990; *Freeman* v. *Pendergast,* 94 Ga. 369, 21 S. E. 837, 844; *Haggin* v. *Straus,* 148 Ky. 140, 146 S. W. 391, 395; *Safe Deposit & Trust Co.* v. *Ellis,* 136 Md. 334, 110 Atl. 481, 483; *Strite* v. *Wolf,* 268 Pa. 221, 110 Atl. 753, 754; *Royce* v. *Adams,* 123 N. Y. 402, 25 N. E. 386.

The courts have held that on appointment of a new trustee, title to the trust property vests in him by virtue of the appointment and without necessity of a formal conveyance. *Thomas* v. *Nat. Bank of Commerce* (Wash., 1936) 60 Pac. (2d) 264, 269; *Gregory* v. *Merchants State Bank,* (Tenn., 1939) 135 S. W. (2d) 465, 474; *Freeman* v. *Pendergast, supra; Parkhill* v. *Doggett,* 135 Ia. 113, 112 N. W. 189, 190; *Toronto General Trust Co.* v. *Chicago, B. & Q. R. Co.,* 123 N. Y. 37, 25 N. E. 198, 200; *Wooldridge* v. *Planters Bank,* 1 Sneed (Tenn.) 297, 302; *McCallum* v. *Wing,* (C. C. A. 1st,

1929) 30 F. (2d) 505, 510; *Bogert, Trusts & Trustees,* (1935) Vol. 3, sec. 532.

VII.

Federal Question.

It would seem clear that the instant case raises federal questions within the purview of section 237(b) of the Judicial Code.

Respondent, in denying the acquisition of title to the real property by the receiver, and in denying that the Bill of Complaint presented a cause of action to compel respondent to perform specifically the contract of sale, raised certain points in his demurrer (R. 144-148), which points, in turn, by reason of the decision of the Trial Court (R. 188), were made the basis of the petition for appeal presented to the Supreme Court of Appeals of West Virginia in the assignment of errors (R. 8). As previously indicated herein under "Questions Presented", *supra,* p. 12, respondent contended and the courts below ruled that under the national banking laws, petitioner's predecessor as receiver did not have capacity or power to take title to the real estate in his name, even though taken in his name in his fiduciary or representative capacity, and title passed to Receiver Miller, individually. The point was also made in this connection that under the national banking law title should have been taken in the name of the bank as a corporation. It was further contended by respondent and ruled by the courts below in favor of respondent, that even if it were to be assumed that legal title to the property did pass to petitioner's predecessor in his fiduciary or representative capacity, there was no provision in the national banking law whereby title passed or could pass by operation of law from petitioner's predecessor, Robert Miller, to a successor receiver.

On the other hand, petitioner contended that under the settled construction of national banking law, title to real estate purchased on behalf of the receivership, with receivership funds, by direction of the Comptroller of the Currency and the Secretary of the Treasury, could lawfully be acquired by the receiver in his fiduciary or representative capacity; and that upon the death or resignation of a receiver, title passed by operation of the national banking law to his successor receiver.

It was also contended by respondent, and so ruled in its favor by the courts below, that the effect and operation of the deeds in question were governed by West Virginia laws and that under said laws title passed to the predecessor receiver in his individual capacity and hence thereafter passed to heirs-at-law of petitioner's predecessor. *On the other hand, petitioner contended that these questions were controlled by the national banking law, as interpreted and construed by the courts.*

As previously herein pointed out, *supra,* p. 7, the decision of the Supreme Court of Appeals of West Virginia, (R. 194), and the decision of the Circuit Court of Marion County upon remand of the case to that court (R. 186), were predicated primarily on the construction and interpretation given by those courts of the national banking law. In its opinion (R. 196), the Supreme Court of Appeals stated:

> "In order that the questions involved in this certificate may be properly discussed, it is necessary to consider the effect of the appointment of a receiver for a national banking association by the Comptroller of the Currency, as well as the authority and powers of the receiver so appointed."

This Court has held that where the receiver of a national bank claims rights under the national banking law, and

such rights are denied by a State court, a Federal question is involved. *Seabury* v. *Green,* (1935) 294 U. S. 165, 168.

It is settled doctrine that the national banking laws, as interpreted and construed by the courts, constitute a complete system covering not only the organization but also the liquidation in receivership of national banks, and that state laws cannot be effective when in conflict with the national banking law, or where the state law, if applied, would defeat the purposes of the national banking law. *Cook County National Bank* v. *United States,* (1882) 107 U. S. 445, 448; *Jennings* v. *U. S. F. & G. Co.,* (1935) 294 U. S. 216, 226; *Davis* v. *Elmira Savings Bank,* (1896) 161 U. S. 275, 283; *Yonkers* v. *Downey,* (1940) 309 U. S. 590, 596; *Deitrick* v. *Greaney,* (1940) 309 U. S. 190, 200; *Rawlings* v. *Ray,* (1941) 312 U. S. 96; *Easton* v. *Iowa,* (1902) 188 U. S. 220, 230-232.

It is also settled doctrine that receivers of national banks are officers of the United States and agents of the Comptroller of the Currency, and derive their authority and power and capacity to act from the national banking law (as implemented by court decisions) subject, of course, to appropriate instructions from the Comptroller of the Currency. *Kennedy* v. *Gibson, et al.,* (1869) 8 Wall. 498, 504-506; *In re Chetwood,* (1897) 165 U. S. 443, 458; *U. S.* v. *Weitzel,* (1918) 246 U. S. 533, 541; *Pufahl* v. *Parks,* (1936) 299 U. S. 217, 225; *Cooper* v. *O'Connor,* (App. D. C., 1938) 99 F. (2d) 135, 139, *cert.* den. 305 U. S. 643; *Cooper* v. *O'Connor,* (App. D. C., 1939) 105 F. (2d) 761, 763.

It would seem clear that either by express provision of the national banking statutes or by implementation of said statutes by court decisions interpreting and construing the same, the issues in the instant case are embraced within the provisions and requirements of the national banking law as thus implemented, and consequently the question for de-

cision is therefore one of federal law. *American Surety Company* v. *Bethlehem National Bank,* (1941) 314 U. S. 314, 316; *Rawlings* v. *Ray,* (1941) 312 U. S. 96, 98; *Deitrick* v. *Greaney,* (1940) 309 U. S. 190, 200; *Merrill* v. *National Bank,* 173 U. S. 131; *Davis* v. *Elmira Savings Bank,* (1896) 161 U. S. 275; *Cook County National Bank* v. *United States,* (1882) 107 U. S. 445, 448.

VIII.

Finality of Judgment.

It would seem clear that the judgment of the court below is final within the purview of Sec. 237(b) of the Judicial Code.

Petitioner, by the bill of complaint in the instant case, set forth therein, fully and completely, the derivation of title of the property in question, and the alleged accrual and vesting of said title in the receiver and sought to compel respondent to carry out its contract for the purchase of said property. Respondent denied the receiver had title to said property, and denied, therefore, the claim or right of petitioner to compel respondent to perform said contract and purchase said property. The court below sustained the contention of respondent and held that Howard Hardesty, as receiver of the bank, did not have title to the property, and further, by necessary implication and inference, held that the bank did not have title to said property, and accordingly decided that petitioner could not compel specific performance of the contract.

As is shown by proceedings heretofore filed in this Court, No. 669, October Term, 1941, Petitioner's predecessor Howard Hardesty, as Receiver of The National Bank of Fairmont, West Virginia, applied for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia in this case, entered on March

15, 1941 (R. 153) and said petition was denied November 10, 1941, *for the want of a final judgment.* The further proceedings in the Circuit Court of Marion County are shown in the record at pages 155-191. The Circuit Court, in compliance with said judgment of the Supreme Court of Appeals of West Virginia, decreed on February 13, 1942, Plaintiff's original bill of complaint be dismissed (R. 186, 189).

The judgment of the Circuit Court of Marion County thus disposed of the merits of the case involving the claim of title by the Receiver and the denial of title by Respondent and the suit by Petitioner to compel specific performance of the contract.

Petitioner thereupon filed in the Supreme Court of Appeals of West Virginia a petition for an appeal from said final decree entered by the Circuit Court of Marion County on February 13, 1942 (R. 3).

On May 18, 1942, the Supreme Court of Appeals of West Virginia refused to grant the appeal prayed for as "plainly right" (R. 1) and hence it follows that the decree of the Circuit Court of Marion County constitutes the final decree of the highest court of the State in which a decision could be had. Sections 5795 and 5811 of the West Virginia Code; *Moore* v. *Johnson,* (1884), 24 W. Va. 549; *Blumberg* v. *Snyder* (1922), 90 W. Va. 145, 148; *Virginian Ry. Co.* v. *Mullins* (1926), 271 U. S. 220; *Wheeling Steel Corp.* v. *Fox* (1936), 298 U. S. 193, 205.

IX.

Reasons Relied Upon for Requested Allowance of Writ.

(1) The decision of the court below, to the effect that a receiver of a national bank cannot take title in his own name, in his representative or fiduciary character as receiver, of real estate acquired on behalf of the receivership

during the course of liquidation would seem to be directly in conflict, in principle, with the decisions of this Court in the case of *Kennedy* v. *Gibson, et al.*, and of the other cases, cited on p. 14 hereof. to the effect that the receiver is a statutory assignee of the assets of a national bank and that title to such assets passes to him as receiver.

The decision of the court below, to the effect that under the national banking laws title to assets of the receivership does not pass, by operation of law, to a successor receiver, would likewise seem contrary to the principles established by the aforesaid cases cited on pp. 13-14 hereof, and in *Kennedy* v. *Gibson, et al., supra,* p. 13.

(2) However, examination of the authorities seems to indicate that neither of the foregoing points has heretofore been specifically passed upon by this Court, and the questions would seem to be of such general importance, incident to the interpretation and construction of the national banking laws, that this Court should grant the writ of *certiorari* for the purpose of settling the law.

(3) As indicated in the discussion herein, *supra,* p. 15, it has long been the established construction and interpretation by the Comptroller of the Currency of the national banking laws upon the foregoing points, that title may properly be taken by receivers of national banks of real estate acquired by them, and that, upon the death or resignation of a receiver, title to the receivership assets passes, by operation of law, to his successor receiver.

Many parcels of real estate thus acquired by receivers of national banks all over this country have been sold.

If the decision of the court below is permitted to stand, serious doubt upon the validity and effectiveness of titles to real estate thus acquired and thus sold by receivers of national banks will result.

It is believed that these consequences are of such importance that this Court may well feel justified in granting the review.

(4) The decision of the court below, as applied in the instant case, seriously affects the administration by the Comptroller of the Currency of the national banking laws relating to the liquidation of national banks in receivership, and, therefore, in the interest of future guidance of the Comptroller in these respects it is believed the law should be settled by an authoritative decision from this Court.

Respectfully submitted,

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